Filed 4/9/20 P. v. Leighton CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KENNETH LEIGHTON, Defendant and Appellant.	B297093 (Los Angeles County Super. Ct. No. BA226413)

APPEAL from an order of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Amanda V. Lopez and Theresa A. Patterson, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

Kenneth Leighton appeals from the superior court's order denying his petition under Penal Code section 1170.95,[1] which allows certain defendants convicted of murder under a felony murder or natural and probable consequences theory to petition the court to vacate their convictions and for resentencing. Leighton argues that his petition stated a prima facie case for relief under the statute and that the superior court erred in denying the petition without a hearing and without appointing him counsel. Because Leighton was not convicted under a felony murder or natural and probable consequences theory, he did not state a prima facie case for relief under section 1170.95. Therefore, the superior court did not err in denying his petition.

PROCEDURAL AND FACTUAL BACKGROUND

A. *A Jury Convicts Leighton and a Co-defendant on Two Counts of First Degree Murder with Special Circumstances, and This Court Affirms*

In 2003 a jury convicted Leighton and his friend Randall Williams of murdering Jamie Navaroli and April Mahoney, two witnesses who were going to testify against Leighton in a burglary case. (*People v. Williams* (June 27, 2006, B166126) [nonpub. opn.].) After giving statements to the police about the burglary, Navaroli and Mahoney hid first in a motel and then at a friend's house, where Williams found them and shot them with a nine-millimeter handgun. Navaroli died at the scene; Mahoney

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1 Statutory references are to the Penal Code.

died several days later, on Christmas Eve, although she identified Williams as the shooter before she died.

While Navaroli and Mahoney were hiding from Leighton, witnesses heard Leighton say Navaroli "was dead because that's what happens to rats"; "When I see Jamie, he's dead"; "Jamie is finished" and "will be dealt with"; referring to Navaroli's death, "[L]et's just say snitches belong in ditches"; and, referring to Mahoney's death, "Well, you can't leave any witnesses." When Mahoney died, Leighton said, "Do you know what I got Jamie for Christmas? I got him April." After the police arrested Williams, Leighton made deposits to Williams's inmate trust account and accepted 23 collect telephone calls from Williams. (*People v. Williams*, *supra*, B166126.)

The jury convicted Leighton of murdering Navaroli and Mahoney on the theory he aided and abetted Williams. The jury also found true the special circumstance allegations of lying-in-wait, multiple murders, and killing of witnesses. The trial court sentenced Leighton to two consecutive terms of life imprisonment without the possibility of parole. In 2006 this court affirmed his convictions. (*People v. Williams*, *supra*, B166126.)

B. *The Superior Court Denies Leighton's Petition for Resentencing*

In January 2019 Leighton filed a petition for resentencing under section 1170.95. Although the petition is not in the record, a minute order reflects that the court denied it in March 2019 without having a hearing and without appointing counsel. The court ruled Leighton was not eligible for relief under section 1170.95 because he "failed to make out a prima facie case for relief." The court stated: "In the murders for which [Leighton]

was convicted, the murders were found to be willful, deliberate and premeditated. [¶] [Leighton] solicited [Williams] to murder two witnesses against him in a burglary case. [¶] Two special circumstances were found true—murder of a witness and lying in wait. [¶] The case was not tried on a theory of either felony murder or natural and probable consequences. [Leighton] was an aider and abettor and a major participant." Leighton timely appealed the order denying his petition.

DISCUSSION

Senate Bill No. 1437, which became effective on January 1, 2019 (see Stats. 2018, ch. 1015, § 4), amended "the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); see *People v. Larios* (2019) 42 Cal.App.5th 956, 964.) Among other things, Senate Bill No. 1437 added section 189, subdivision (e), which provides that a person is liable for murder "only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (See *Larios*, at p. 964.)

Senate Bill No. 1437 also added section 1170.95, subdivision (a), which provides that "[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a); see *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 417 [§ 1170.95 provides "a procedure by which those convicted of murder can seek retroactive relief if the changes in the law would affect their previously sustained convictions"]; *People v. Martinez* (2019) 31 Cal.App.5th 719, 722-723 [same].)

Section 1170.95, subdivision (c), provides that, once a person files a petition, "[t]he court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the

prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." Section 1170.95, subdivision (d)(1), states: "Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been [*sic*] sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause."

Leighton does not argue he was convicted of felony murder or murder under a natural and probable consequences theory. Nor does he argue the superior court erred in ruling that he was a major participant and that he aided and abetted two special circumstances murders. Indeed, Leighton states: "The issue is not whether the court reached the correct result."

Instead, Leighton argues that, if a petition under section 1170.95 "contains the required allegations, the court (a) must appoint counsel if so requested, and (b) consider[ ] a response from the prosecutor and an optional reply from petitioner's counsel." Leighton contends the superior court erred by denying the petition "without appointing counsel and without affording even minimal opportunity to be heard" which "violated the express mandates of the statute . . . ." Leighton argues that section 1170.95 does not allow a court to deny a petition unless "counsel is appointed, a response is received from the prosecutor, and an optional reply is received from petitioner" and that, "[a]t that point, the court determines if a prima facie showing of entitlement to relief continues to exist." Leighton asserts that,

"[u]pon receipt of a petition that is complete on its face and that requests appointment of counsel," the court must appoint counsel and that the court may not "declin[e] to appoint counsel, conduct[ ] its own inquiry, and summarily rul[e] on the petition." According to Leighton, "unless a petition is lacking on its face one or more of the required averments to state a claim for relief," the court must appoint counsel if the petitioner requests it and "must receive information from the parties before it decides whether a petition that is facially sufficient may be dismissed or may go forward."

In *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted March 18, 2020, S260493 (*Verdugo*), this court rejected these very arguments. We explained that "the relevant statutory language, viewed in context, makes plain the Legislature's intent to permit the sentencing court, before counsel must be appointed, to examine readily available portions of the record of conviction to determine whether a prima facie showing has been made that the petitioner falls within the provisions of section 1170.95—that is, a prima facie showing the petitioner may be eligible for relief because he or she could not be convicted of first or second degree murder following the changes made by [Senate Bill No.] 1437 to the definition of murder in sections 188 and 189." (*Verdugo*, at p. 323.) We further explained that, if "the court concludes the petitioner has failed to make the initial prima facie showing required by subdivision (c), counsel need not be appointed." (*Id.* at pp. 332-333; accord, *People v. Torres* (Mar. 26, 2020, B296179) ___ Cal.App.5th ___, ___ [2020 WL 1465632, p. 5]; see *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1140 ["the trial court's duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner 'falls

within the provisions' of the statute," and because "the trial court denied defendant's petition based upon his failure to make a prima facie showing that the statute applies to his murder conviction, defendant was not entitled to the appointment of counsel"].) Here, Leighton failed to make a prima facie showing he is entitled to relief under section 1170.95, and the trial court did not err in denying his petition.

Finally, contrary to Leighton's assertion, the superior court's (in Leighton's words) "summary and ex parte adjudication of the petition" did not violate his right to counsel under the Sixth Amendment to the United States Constitution. The relief afforded by section 1170.95 is "not subject to Sixth Amendment analysis. Rather, the Legislature's changes constituted an act of lenity that does not implicate defendants' Sixth Amendment rights." (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156; accord, *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1114-1115, review granted Nov. 13, 2019, S258175.) Moreover, as we explained in *Verdugo*, "the standard for subdivision (c)'s second review—'a prima facie showing that he or she is entitled to relief'—is identical to the standard for issuance of an order to show cause in a habeas corpus proceeding." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328.) And there is no constitutional right to counsel in a habeas corpus proceeding. (See *In re Barnett* (2003) 31 Cal.4th 466, 474 ["there is no federal constitutional right to counsel for state habeas corpus proceedings"]; *McGinnis v. Superior Court* (2017) 7 Cal.App.5th 1240, 1244, fn. 2 ["[a]ny right to habeas corpus counsel, absent an order to show cause, is purely statutory"]; *Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, 1357 ["a criminal defendant has no constitutional right to counsel in habeas corpus proceedings"]; cf. *In re Sanders* (1999)

21 Cal.4th 697, 717, fn. 11 ["once an order to show cause issues in a noncapital case, indicating the petitioner has made a prima facie showing of entitlement to relief, 'the appointment of counsel is demanded by due process concerns'"]; *People v. Shipman* (1965) 62 Cal.2d 226, 232-233 [court need not appoint counsel for a writ of coram nobis in the absence of allegations stating a prima facie case].) Nor did the court deny Leighton due process. Leighton is not entitled to relief under section 1170.95 because he was not convicted of murder under a felony murder or natural and probable consequences theory. No amount of additional briefing, oral argument, or other process can change that. (See *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 [petitioner not entitled to counsel under section 1170.95 where "he is indisputably ineligible for relief"].)

DISPOSITION

The order denying the petition is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J. DILLON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.